RE: DOUGLAS TAY GUAN SHUNG; EX-PARTE: THE GOVERNMENT OF MALAYSIA

HIGH COURT, KOTA KINABALU
TUAN IAN H.C. CHIN J.
[BANKRUPTCY NOTICE NO. K 900 OF 1989]
22 JANUARY 1994

BANKRUPTCY: Application to set aside receiving and adjudication orders - Bankrupt claiming that bankruptcy notice was incomplete and defective - Bankrupt had previously applied to set aside receving and adjudication orders - Whether previous application was a bar to the present application.

The bankrupt applied to set aside the receiving and adjudication orders on the grounds that the bankruptcy notice was incomplete and defective in that the said notice failed to carry the Indorsement of Notice on it. The bankrupt had in fact made a previous application to set aside the receiving and adjudication orders, but on different grounds. The question that arose was whether the previous application was a bar to the present application.

Held:

[1] The Indorsement of Notice on the bankruptcy notice forms a very important part of the prescribed form and when that part is missing, as in this case, the bankruptcy notice is invalid.

[2] Nevertheless, the defective bankruptcy notice could have been advanced in the first application as a ground for setting aside the receiving and adjudication order. At that particular time the debtor was represented by Counsel and his Counsel must be taken to have known of the defect in the bankruptcy notice but had chosen not to rely on it as a ground for setting aside the receiving and adjudication orders. The debtor is similarly assumed to have known of the defective bankruptcy notice. It is an abuse of the process of the Court for the debtor to now raise the issue of the invalid bankruptcy notice when he could have done so at the first application.

[3] As for the argument that the Court must set aside the receiving and adjudication orders, it being a nullity, the Court has a discretion whether or not to annul a receiving and adjudication order. In view of the fact that the present application could have been made at the first application, to accede to the application, even though it is meritorious, would be to encourage abuse of the Court. The invalid proceedings emanating from the invalid bankruptcy notice is not a good enough reason for the Court to excuse the abuse of the process of the Court.

Obiter:

The parties and Counsel involved in litigation must diligently prosecute their claims. The Court must not allow multiple actions or applications, when one suffices, which unnecessarily take up the Court's time and thus contribute to the delay in the disposal of cases. Given the present condition of the Courts in Malaysia, to allow the present application would be to encourage more of such applications which further aggravate the delay in the disposal of cases.

[Debtor's application dismissed with costs].

Cases referred to:

Hamidah bte Abd Hamid & Anor v. Polynesia Offshore Supplies (B) Bhd. [1990] 3 MLJ 94 ***(refd)***

Ghazali b. Mat Noor v. Southern Bank and 4 Ors. [1989] 2 MLJ 142 ***(refd)***

Superintendent of Pudu Prison & Ors. v. Sim Kie Chon [1986] 1 MLJ 494 ***(refd)***

Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. [1975] AC 581 ***(refd)***

Ban Hin Lee Credit Sdn. Bhd. v. Utama Computer Centre Sdn. Bhd. [1991] 2 MLJ 329 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 92(1), 105(1), 131

For the bankrupt - Chong Ket Vui; M/s. Chong Ket Vui & Co.

For the creditor - Osman Ujang, Federal Counsel

JUDGMENT

Ian H.C. Chin J:

This is an application by a bankrupt Douglas Tay Guan Shung ("the debtor") to have the receiving and adjudication order against him set aside on the ground that the bankruptcy notice is "incomplete and defective" because it lacks the indorsement of the warning that non-compliance with the requisitions of the notice constitute an act of bankruptcy and because it lacks the intimation of the right of the debtor to set aside the bankruptcy notice. I would have allowed the application straight away had it not been for the fact that there was a previous application to set aside the receiving and adjudication order, *albeit*, on different grounds, in

respect of which I want Counsel to address the Court as to whether the previous application is a bar to the present application.

As for the invalidity of the bankruptcy notice, Mr. Chong Ket Vui, Counsel for the debtor, referred to *Hamidah bte Abd Hamid & Anor. v. Polynesia Offshore Supplies (B) Bhd.* [1990] 3 MLJ 94, a case of the Court of Appeal [Brunei]. In that case, the notice indorsed on the bankruptcy notice stated a period of 7 days, when it, instead, should have stated a period of 3 days, for filing an affidavit to set aside the bankruptcy notice. The Court there held that bankruptcy proceedings are of quasi-penal nature and it is imperative the procedural requirements are complied with. The Court there also held that the indorsement was so defective as to amount to an irregularity which cannot be cured by the provision similar to s. 131 of the Bankruptcy Act 1967, of Malaysia. As for the consequence of a bankruptcy notice that is invalid *ab initio*, the Supreme Court in *Ghazali b. Mat Noor v. Southern Bank and 4 Ors.* [1989] 2 MLJ 142, held that all proceedings subsequent to the bankruptcy notice are a nullity; the bankruptcy notice was in that case invalid because the interest was not quantified, that is, it did not state the exact amount due at the date of the bankruptcy notice. In the present case, the following entire portion of the prescribed form was missing from the bankruptcy notice, *viz*:

> Indorsement on Notice
>
> You are specially to note -
>
> That the consequences of not complying with the requisitions of this notice are that you will have committed an act of bankruptcy, on which bankruptcy proceedings may be taken against you.
>
> If, however, you have a counter-claim, set-off, or cross demand which equals or exceeds the amount claimed by ... in respect of the judgment, and which you could not set up in the action in which the said judgment was obtained, you must within ... days apply to the Court to set aside the notice by filing with the Registrar an affidavit to the above effect.
>
> Name and address of solicitor suing out notice,
>
> or
>
> This notice is sued by ... in person.

The Indorsement of Notice forms a very important part of the prescribed form and when that part is missing, as in this case, the bankruptcy notice is invalid. I will now turn to the issue arising out of the previous application and for this purpose, a little of the history of this matter has to be stated.

On 24 January 1985 the Government of Malaysia ("the creditor") obtained judgment against the debtor. The said invalid bankruptcy notice herein dated 9 September 1989 was served on the debtor on 2 October 1989. On 19 January 1990 the creditor took out the bankruptcy petition herein upon the hearing of which on 11 September 1990, the debtor, who was present, was adjudged a bankrupt. By a notice of motion dated 21 September 1990, the debtor applied "for an order that the receiving order and adjudication order made on 11 September 1990 under Bankruptcy Petition No. K44 of 1990 be rescinded and annulled respectively pursuant to s. 105(1) and/or 92(1) of the Bankruptcy Act 1967". The debtor filed an affidavit in support of his application, the gist of which was that he has assets worth RM4,586,000 which far exceeds his unsecured debt of RM125,676.94. This motion was heard on 11 June 1991 and the debtor was then represented by his erstwhile solicitors Messrs Sugumar & Co. At that hearing the honourable Justice Dato Syed Ahmad Idid set aside the adjudication order on the condition that if the debt due to the creditor was not paid in full on or before 11 December 1991, the adjudication order "will be reordered". There was no appeal against this order and the debtor also did not pay his debt due to the creditor. On 5 November 1993, the debtor took out the present application praying for, actually, the same order as the previous application but on a different ground, which I have already set out, *supra*. At the hearing of this latter application on 21 December 1993, I asked the parties to address me as to whether a litigant can take out separate proceedings claiming for the same order based on different grounds which he could have applied for in one proceeding. I asked Counsel to send me their submissions before I adjourned for judgment. I have since then received their submissions.

Mr. Osman Ujang, Federal Counsel, referred to the case of *Superintendent of Pudu Prison & Ors. v. Sim Kie Chon* [1986] 1 MLJ 494 SC, at p. 498, where it is said:

> ... we would refer to the pronouncement of the Privy Council in *Hoystead & Ors. v. Commissioner of Taxation* and a catenation of cases to the like effect, namely, that the plea of *res*

> *judicata* applies, except perhaps where special circumstances may conceivably arise of sufficient merit to exclude its operation, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time.
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> There is moreover the inherent jurisdiction of the Court in cases where *res judicata* is not strictly established, and where estoppel *per rem judicatam* has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render any reagitation of the questions formally adjudicated upon a scandal and an abuse, the Court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require.

The Privy Council in *Yat Tung Investment Co. Ltd v. Dao Heng Bank Ltd* [1975] AC 581, at p. 590, was also cited, and it says:

> ... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.

It is my conclusion that the defective bankruptcy notice could have been advanced in the first application as a ground for setting aside the receiving and adjudication order. At that particular time the debtor was represented by Counsel and his Counsel must be taken to have known of the defect in the bankruptcy notice but had chosen not to rely on it as a ground for setting aside the receiving and adjudication order. The debtor is similarly assumed to have known of the defective bankruptcy notice. What we are concerned with, when deciding whether there is an abuse of the process of the Court, is the proceedings of the first application when the order of receiving and adjudication was first sought to be set aside and not with the hearing of the bankruptcy petition. It, therefore, does not matter that the official assignee and Counsel for the creditor failed to see the defective bankruptcy notice at the hearing of the bankruptcy petition. It is an abuse of the process of the Court for the debtor to now raise the issue of the invalid bankruptcy notice when he should have done so at the first application. See *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd., supra*. But that does not end the matter.

Mr. Chong Ket Vui argued that the Court has no choice but to set aside the receiving and adjudication order because the whole proceedings subsequent to the invalid bankruptcy notice are a nullity. Mr. Chong Ket Vui added that if the orders are not set aside, it has the effect of "validating" the nullity. As for the latter argument, I need only refer to *Ban Hin Lee Credit Sdn. Bhd. v. Utama Computer Centre Sdn. Bhd.* [1991] 2 MLJ 329 and the cases cited therein with approval. That case is the authority for saying that though an order, which is a nullity, is not set aside, it is still a nullity. As for the argument that the Court must set aside the receiving and adjudication order, I am of the opinion that, be it under s. 92(1) or s. 105(1) of the Bankruptcy Act 1967, or under the inherent jurisdiction of the Court, the Court has a discretion whether or not to annul a receiving and adjudication order. Since the Court has a discretion and in view of my conclusion that the present application could have been made at the first application and therefore the present application is an abuse of the Court, I would refuse to grant the order prayed for. To accede to the application, even though it is meritorious, would be to encourage abuse of the Court. If it is an abuse of the Court, the Court surely has a discretion whether or not to grant an application which, though it has merit, is nevertheless, an abuse of the Court. The invalid proceedings emanating from the invalid bankruptcy notice is not a good enough reason for the Court to excuse the abuse of the process of the Court. The Court is faced with a huge backlog of cases. The parties and Counsel involved in litigation must diligently prosecute their claims. The Court must not allow multiple actions or applications, when one suffices, which unnecessarily take up the Court's time and thus contribute to the delay in the disposal of cases. Given the present condition of the Courts in Malaysia, to allow the present application would be to encourage more of such application which further aggravate the delay in the disposal of cases; this I must not allow. It is for that reason too that I refuse to exercise my discretion to annul the receiving and adjudication order. But, as I said earlier, despite my refusal to annul the receiving and adjudication order, the same is still a nullity. I trust the official assignee will take note and act accordingly. I therefore dismiss the debtor's application with costs.